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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
SEP 13 1954
Clerk, Supreme Court, Utah

AUSTIN F. WINCHESTER,
Plaintiff and Appellant,

vs.

EGAN FARM SERVICE, INC.,
Defendant and Respondent.

Defendant's Brief

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IN THE SUPREME COURT

of the

STATE OF UTAH

AUSTIN F. WINCHESTER,
Plaintiff and Appellant,

vs.

EGAN FARM SERVICE, INC.,
Defendant and Respondent.

I

STATEMENT OF FACTS.

Defendant deems it advisable and desirable to supplement the Statement of Facts as set forth in Plaintiff's brief. To the extent that it is repetitious of plaintiff's statement, it is to the end of coordinating the facts.

Plaintiff commenced its action against Long Manufacturing Company and Dearborn Motors Corporation, as well as the defendant. Long Manufacturing Company and its successor, Dearborn Motors, was alleged by plaintiff as being the manufacturer of the baler. Defendant Egan was alleged to have "assembled or attached the part of the baler which caused the injury".

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The complaint further alleged that plaintiff was struck in the face "by a lever, which, without fault of the plaintiff, *broke loose from its mounting*". The complaint then alleged:

> "4. Said lever and mounting was negligently and carelessly attached to the aforesaid baler, was negligently, poorly and improperly engineered and constructed, and contained attachment parts which were weak, defective and insufficient in size and strength, all to the degree that the same was unsafe and constituted a menace to human life and limb. Defendants knew, or should have known, that the same was dangerous and defective for the purpose of its intended use."

Service of process was attempted to be made on the defendants, Long Manufacturing Company and Dearborn Motors, but such service was quashed on motion of such defendants. Plaintiff elected to proceed against the defendant Egan, which was neither the engineer, designer nor manufacturer, and who was in no wise responsible for the design or construction of the baler, nor any of its component parts, including the lever assembly.

Plaintiff called as his first witness A. Merlin Egan, President and Manager of the defendant company. He testified that he received the baler in question from his distributor. That when so received the lever proper was not attached to the baler, *but that the attaching parts,* namely, the bolt, nut, washer and spacer, were attached. Thus, in attaching the lever, all he had to do was to remove the nut and washer from the bolt (which was already in the frame) slip the lever on, replace the washer and tighten the nut. He used no parts of his

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own, and all parts to be used came attached to the frame (Tr. 14-21). He further testified that the machine as so assembled was delivered to plaintiff a few days prior to September 18, 1951, and that plaintiff, after trying the machine out for a few days, bought it on September 18, 1951.

We here interject to recall to the Court that the contention of plaintiff is that the defendant, Egan Farm Service, Inc., negligently and improperly attached the lever assembly by (1) using an undersized bolt, and, (2) completely omitting the sleeve or spacer. Neither of these contentions were proven by the testimony of Mr. Egan, but on the contrary his testimony established (1) that he used the parts furnished by the manufacturer, and none other, and (2) the sleeve or spacer was included in the attachment of the lever, and was on the machine at the time of delivery.

We return now to the facts as established by the testimony.

Plaintiff's next witness was Kerry Olsen, a farmer, from near Eden, Utah, and himself the owner of a baler of the type in question which he, too, purchased in 1951 (Tr. 23). He identified Exhibits A, B and C as parts coming from his baler. The exhibits were received in evidence for illustrative purposes. On cross-examination, he testified that during normal operations parts of the machine became loosened, and it is necessary from time to time to go over the machine and tighten them up (Tr. 24), or *replace them* (Tr. 27).

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Plaintiff's next witness was plaintiff himself and it is necessary that his testimony be detailed. He testified on direct examination that he did custom work with hay baling equipment, tractors, and carry-alls, and that all of his time was spent working with farm and industrial equipment (Tr. 28). He bought the baler in September, 1951, used it to bale some 1300 bales of hay that fall, stored it through the winter, and had used it for some two weeks the next spring prior to the accident (Tr. 29-30). He demonstrated to the Court and jury the position of the lever while baling, namely, that when in the depressed position the end of it was at his right hip as he sat on the tractor seat, and that when released it moved upward and backward (Tr. 31-32). On the day in question he had completed baling one section of the field, had depressed the lever to take the baler out of operation, and moved to another section to bale some more. With the lever in this depressed position at his right hip, he turned on his seat to the right, brought his face over the lever, reached for the handle to release it, but before he touched it the lever released itself and the spring tension caused it to fly up and strike him in the face (Tr. 31-32). The handle struck him across the bridge of the nose, *and the extreme end of the handle pierced his right eye* (Tr. 33) (we emphasize this point particularly for reasons that will presently appear).

After testifying as to the nature and extent of his injuries, he testified that about two weeks after the accident he removed the lever from the baler, and removed the bolt, Exhibit E, (which when received in evidence was but part of a bolt), and that there was no sleeve. In explaining why Exhibit E was but part of

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a bolt, he said that in removing it with wrenches he twisted it in two, and the nut end fell into the grass and he couldn't see well enough to find it (Tr. 45-46). He also testified that there were washers on the bolt when he removed it (Tr. 47), and at that time the lever had some up and down play in it. He hadn't noticed it before.

On cross-examination he testified that he had owned balers before purchasing this one, but was in the market for a new one. Others had told him that the Long 50 was a good baler, and he decided to buy one. He saw this one at Egan's, and arranged for it to be sent to his farm. He used it for two or three days and bought it (Tr. 52-54), despite the fact that he had concluded from his demonstration there were things wrong with it—loose and defective parts (Tr. 58-59), although nothing wrong with the lever assembly that he noticed. He did nothing himself to correct the defects, not even to tighten loose bolts he knew were loose, but used it in that condition that fall, and the next spring up to the time of the accident (Tr. 59-60). Prior to the accident plaintiff called Egan's mechanic to come and fix a broken part, and while the mechanic was there plaintiff did *not* call his attention to other matters that plaintiff knew needed fixing (Tr. 61-63). Also that *at the time he bought the machine* he knew the lever had too much play in it (Tr. 66).

He further testified that the machine was not in his possession continuously prior to the accident but three other fellows had it and used it at different times (Tr. 66-67). Also that he never did like the lever assembly, and had discussed with an Egan representative a

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change in its design, because, as it was, he was running into it every time he walked between the tractor and the baler (Tr. 68), and that it was in the way in getting on and off the seat (Tr. 71).

He was then brought back to the occasion of his removal of the bolt, Exhibit E, shortly after the accident. In this connection, he testified that in addition to the nut and bolt, there were two washers on the nut end of the bolt, and that in attempting to loosen the nut, he twisted the bolt in two. The two washers, as well as the nut end of the bolt dropped in the grass, and he couldn't find them because he "couldn't see too good"—he still had his eye bandaged, and the other eye was inflamed (Tr. 75).

In his further description of how the accident happened, he reiterated that the lever was at his right hip in a depressed position, that leaning to his right he had brought his face over the lever, and was looking downward, when it released, the handle striking his nose, and the extreme end of the handle punctured his eye (Tr. 86-88). He denied that he was in the process of climbing on the tractor from the right when the accident happened (Tr. 86), but acknowledged, following a demonstration, that if he was he would then be in a position for the lever to strike across the bridge of his nose and the end to pierce his right eye (Tr. 89.)

Next followed a demonstration in which plaintiff participated, and which disclosed that with the lever assembled without the bushing (sometimes referred to as the sleeve or spacer—Exhibit B) the lever wouldn't

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work at all (Tr. 89-93). At this he acknowledged that perhaps the bushing had been there, but had become broken during the course of the baler's use (Tr. 93).

On redirect examination he sought to demonstrate that a spot of weld on the frame prevented the lever from working in the previous demonstration made without the bushing, and showed how by using some half dozen additional washers (which he previously had testified were not on his machine), and a loose nut on the bolt, the lever could work without the bushing (Tr. 110). However, on recrossexamination, he cinched up the nut (as he had previously testified that the nut in question was cinched so tight he broke the bolt in removing it) and when so tightened it was again demonstrated that with a tight nut and no bushing the lever couldn't be operated at all (Tr. 111-112).

The further testimony consisted of that of Max Robinson, who had used the baler but who couldn't recall whether it was subsequent or prior to the accident, and who testified that he had not adjusted any bolts or worked on the lever assembly (Tr. 113-114). Also the testimony of Evan Stark, who had used the baler, prior to the accident and who did not add, tighten or remove any bolts from the lever assembly. Dick Spurlock, the third man who used the baler, was not called as a witness, but one George Combe and one Bud Combe testified that during the time Spurlock was using the baler at their place they never saw him work on the lever assembly, or otherwise tighten or adjust any bolts. (Tr. 116-121).

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We are mindful that the foregoing detail of the evidence has been somewhat lengthy, but we have deemed it essential that this Court be fully advised of the evidence before the lower Court, and on which it based the ruling from which this appeal is made.

II.

POINTS RELIED UPON BY PLAINTIFF AND CONTROVERTED BY DEFENDANT.

In seeking a reversal of the lower Court's order for a directed verdict in favor of defendant, plaintiff raises the following points:

(A) The evidence tended to prove negligence on the part of defendant *in assembling* the baler,

(B) The evidence did not prove as a matter of law that the accident was caused by plaintiff's negligence, nor that plaintiff's negligence contributed thereto,

(C) The evidence did not prove as a matter of law that plaintiff assumed the risk of his injuries.

In this connection plaintiff assigns to the lower Court the latter ground as the basis for the lower Court's ruling. In so doing plaintiff is acting purely gratuitously, as there is nothing in the record to so indicate. True it is that prior to making its ruling, the Court required, and listened intently to, extensive argument by respective counsel on each of the points, but there is and was nothing to indicate that its ruling was based on any one of these points, to the exclusion of the others. Actually the matter is of little consequence, because,

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regardless of what may or may not have been particularly pursuasive to thelower Court, the ruling should be sustained if right for any reason.

We will now consider the several points raised by plaintiff.

III.

ARGUMENT

A.

THE EVIDENCE FAILED TO ESTABLISH ANY NEGLIGENCE ON THE PART OF DEFENDANT IN ASSEMBLING THE BALER PROXIMATELY CAUSING PLAINTIFF'S INJURIES.

In considering this phase of the case, it is important to bear in mind that both in the lower Court, and in his brief herein, plaintiff has contended that defendant's negligence consisted of two acts:

(1) Omitting to insert the bushing (sometimes referred to as the sleeve or spacer) in attaching the lever, and

(2) Using a 3/8" bolt, instead of a 1/2" bolt in attaching the lever.

In discussing this point of argument plaintiff inaccurately, as we believe, refers to defendant's actions in preparing the baler for delivery as "assembling the baler".

Actually, the baler came completely assembled except for the attchment of the lever. To the extent that

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the act of so attaching the lever can be described as assembling it, defendant admittedly did so, but only to that extent.

It is also necessary to bear in mind that proof of negligence on the part of defendant, standing alone, is not sufficient. The proof must also show that such negligence proximately caused plaintiff's injuries. Our views on both points will now be presented.

First, the question of defendant's asserted negligence. All of the affirmative evidence on the point must come from the testimony of Mr. Egan, and the plaintiff, because no one else testified in regard thereto. Mr. Egan's testimony established that when he received the baler from the distributor, the lever was detached and separately wrapped, but that the bolt, washers, spacer and nut were attached to the baler, and all that was necessary for him to do was to remove these parts from the frame, insert the lever, and fasten it with these same bolt, spacer, washers and nut, and this was done. He used no parts of his own—used only the parts supplied him by the distributor—and all of them.

Thus his testimony established as a part of plaintiff's own case, that the bushing in question was inserted in the attaching process. True it is, that he was the President and General Manager of defendant Company, and hence plaintiff may not be bound by his testimony in the strict sense of the word, but his testimony is, nevertheless, competent evidence of the fact, and, except as it may have been contradicted by subsequent witnesses, constitutes the only evidence upon the subject. Now, where is there anything to contradict

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his testimony that the bushing was not omitted in the attaching process? We look to the testimony of the plaintiff himself, as he was the only witness other than Mr. Egan who testified on the subject. His testimony was that some two weeks after the accident, (approximately nine months after the purchase of the machine) and after the machine had been out of his possession and into the possession of at least three other individuals, he disassembled the lever, and no bushing was then present. Actually all he had of the attaching parts at the time of trial was the head end of a broken bolt, the other parts having been lost in the grass at the time of his taking it apart. He did not contradict Mr. Egan in that the bushing was there at the time of delivery, but on the contrary conceded that it could have become broken and fallen out during his operation of the baler during the several months preceding the accident. Further than that, his categorical assertion that the bushing was not present when he detached the lever loses much of its force in the light of his testimony that at the time he couldn't see well, his one eye was bandaged and the other inflamed, and that he actually lost in the grass all of the parts that were present except the head end of the broken bolt.

Further than that, it was conclusively established that the lever assembly operated satisfactorily at all times prior to the accident, and gave the plaintiff no trouble whatsoever; and that without the bushing, and with the nut cinched tight (and it was so tight plaintiff twisted the bolt in two in attempting to loosen the nut), the lever wouldn't operate at all.

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Thus, on the point of whether defendant omitted the bushing at the time of attaching the lever, and before delivery of the baler to plaintiff, we have the following:

(1) Egan's positive testimony that it was not omitted,

(2) The lever operated satisfactorily during the several weeks the bailer was in operation prior to the accident,

(3) Without the bushing the lever bound against the frame and would not operate at all, so it must have been present,

(4) Plaintiff's admission that it might have become broken and fallen out,

(5) Plaintiff's admission that he couldn't see well at the time he detached the lever, and

(6) Plaintiff's admission that he lost in the grass at the time of removal all of the attaching parts that were present, except the head end of the bolt.

, We submit, accordingly, that there was no evidence whatever that defendant omitted the bushing, and that the evidence as well as all inferences that can be drawn therefrom, are all to the contrary.

Now, as to the contention that an undersized bolt was used by defendant in attaching the lever.

On this point the evidence disclosed that the opening through the bushing was large enough to accommodate a 1/2" bolt, but that a 3/8" bolt was used. In the

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first place, in characterizing it as undersized, we use only counsel's descriptive phraseology. True it is that it was an eighth of an inch smaller than the opening in the bushing through which it passed, but it must be remembered that the bushing was designed to turn on the bolt, and thus the bolt of necessity had to be smaller. Further than that, it is the bolt that was supplied by the manufacturer for this purpose, and it must be assumed, absent some pretty potent evidence to the contrary, that the manufacturer provided a bolt that was right and proper. Here it will be recalled that the manufacturer was named a defendant, and was charged with improperly designing and engineering the baler, but the action has not been pursued against him, and there is no evidence in this case to support those allegations. Certainly on the record as it now stands, the defendant cannot be charged with liability for using the precise part that was designed and supplied by the manufacturer for that particular purpose.

Finally, assuming a larger bolt could have been used, there is no evidence that the smaller bolt produced or contributed to the injury. The baler was in operation for many weeks prior to the accident, and the plaintiff, as well as the others who had used it, testified that the lever had never slipped out before. It is inconceivable that if it was the small bolt that caused it to slip out on this occasion, the same slipping would have occurred at least once during the long periods of operation prior to the accident. To say that the three-eights inch bolt caused the accident, as distinguished from any one of a dozen other causes, is purely speculation.

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In support of his contention that defendant was negligent in using this particular bolt, despite the fact it was the one supplied by the manufacturer for this particular purpose, plaintiff cites and relies on two recent decisions of this court. *Hooper v. General Motors Corp.* (*Utah* 1953) 260 *P.* (2) 549, *and Northern v. General Motors Corporation* (*Utah* 1954) 268 *P.* (2) 981. Each of those cases involved suits against the manufacturer of the vehicle involved, as distinguished from a suit against a dealer, as in the instant case. In each case there was affirmative evidence of a defect in materials used, which, as the court pointed out in the Northern case, is something which "in this day of X-ray and other elaborate methods of testing steel" was reasonably discoverable by a manufacturer or assembler such as General Motors.

The duty to reasonably inspect is, of course, the measure of a vendor's responsibility to the purchaser of a manufactured article, but what is reasonable for the manufacturer, may well be unreasonable for a mere vendor. The Northern case presents an apt example. It may well be that a manufacturer or assembler such as General Motors has the duty, through technical processes available to it, to discover defects in steel that go into the finished product, but it would be highly unreasonable to impose the same responsibility on the retailer. Likewise, the designer and manufacturer of the hay baler here involved might well be charged with knowledge that the use of the particular bolt might present a hazard, but how can Egan, who is neither designer, engineer nor manufacturer, be charged with that knowledge. The most he can do is to inspect and

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test. By inspection he is aware that the bolt in question is the one recommended by the manufacturer for the particular purpose, and to all outward appearances fits the purpose. By testing he can ascertain to some degree its suitability, but the extent of the testing must be reasonable. In the instant case the lever assembly worked satisfactorily during five weeks of continuous field operation of the baler—two weeks in the fall and three weeks the following spring. Plaintiff, who himself operated the baler during the greater portion of this period, testified that at no time prior to the accident did it operate other than satisfactorily. In other words, Egan could have field tested this machine for up to five weeks without discovering that the bolt was unsatisfactory. We submit that the doctrine of reasonable inspection does not impose this responsibility on a dealer such as Egan. If it did, a vendor of farm machinery could never sell a new machine, but of necessity would be required to virtually wear it out in tests, unless he was willing to assume the risk of a defect in design or manufacture.

We have, for the purposes of demonstrating the particular point, assumed during the past several paragraphs of this brief, that the bolt was in fact undersized and thus constituted a defect in the machine. We submit, however, that there is no evidence in the record to support this assumption. To reach this assumption plaintiff relies upon an answer given by Mr. Egan, "It wouldn't be right", to a question propounded him by plaintiff's counsel, and informs this court (page 11 of plaintiff's brief) that by the answer Egan admitted that the use of such bolt would constitute negligence.

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We deny both the fact and the inference. The question that was propounded, and the answer, are as follows (Tr. 12):

> "Q But, getting back to my exact question, if someone put a 3/8 bolt through a half inch bushing, as this appears to be, wouldn't you say that that was improperly assembled?
>
> "A. That wouldn't be right."

Plaintiff pursued the matter no further, being content with this somewhat ambiguous answer. What "wouldn't be right"? Obviously what Egan is saying is that the assumption plaintiff's counsel indulged in framing the question, namely, that such use constituted improper assembly, wasn't right. Certainly it is a far cry from any admission on his part that the use of the bolt in question wasn't right, much less negligence.

Plaintiff also complains (page 12 of his brief) that had the trial progressed in its "logical order" he would

> "have brought out evidence that Egan Farm Service, Inc., improperly assembled the lever mechanism on nearly every long "50" baler which it sold and assembled to the minimum point of showing that 3/8 inch bolts were inserted into 1/2 inch bushings (Tr. 12, 22, 24); and that this defect could have been remedied by drilling the baler chamber to 1/2 inch in size and inserting a 1/2 inch bolt."

What he means by had "the trial progressed in its logical order" he would have brought out this evidence, we are at a loss to understand. The trial proceeded to a point where he rested, and, if in resting, he deprived

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himself of the opportunity of offering additional evidence, he alone is to blame. Further than that, the significance of this additional evidence from plaintiff's standpoint is not apparent. What he is suggesting is that this same so-called "undersized bolt" was used by Egan in all of the Long 50 balers he sold. But plaintiff doesn't claim that any other purchaser had any trouble as a result thereof, which reacts against his contention that the bolt was responsible for his difficulty. Actually, plaintiff was induced in part to buy a Long 50 upon the recommendation of other owners (Tr. 52), and if their balers had the same type bolt, it would be but further evidence that the same was both proper and suitable.

Further than that, plaintiff would have proved that "the defect could have been remedied by drilling the baler chamber to 1/2 inch in size and inserting a 1/2 inch bolt." In other words, to cure the "defect" defendant would have had to enlarge the baler chamber to accommodate a larger bolt. This but emphasizes what we have been arguing, namely, that the dostrine of reasonable care does not impose upon a dealer in nationally advertised and widely used farm machinery the duty of redesigning and rebuilding machines supplied him by the manufacturer before he can safely offer them to his customers.

B.

THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT THE PLAINTIFF'S INJURIES WERE PROXIMATELY CAUSED AND CONTRIBUTED TO BY HIS OWN NEGLIGENCE.

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Assuming for this phase of the argument that negligence on the part of the defendant was present, we contend that plaintiff was himself negligent, and such negligence proximately caused, or contributed to his injuries. We make this contention by reason of plaintiff's own testimony that he (1) knew of the hazard presented by the lever while in the depressed condition under spring tension, (2) that it was unnecessary for him to bring his face over the lever in order to release it, and (3) that he needlessly exposed himself to this danger. We quote from his testimony on this point (Tr. 83-85):

> "Q Now assuming that the chair upon which you are now sitting is the tractor seat, can you indicate for the benefit of the Court and the jury approximately where the handle of the lever would be?
>
> "A Well, you could reach the handle of the lever back with your right hand from the tractor seat.
>
> "Q Now you are indicating a point immediately opposite your right hip, are you not?
>
> "A That's right.
>
> "Q As you sit there
>
> "A That's right.
>
> "Q And approximately how far distant from your hip?
>
> "A Well, there is about 18 inches of space between the tractor seat and the fender, and the lever would center in this position. (Indicating)
>
> "Q So the lever would be approximately 9 inches from your hip, you think?

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"A That would be about right.

"Q And up even with your hip?

"A Somewhere close.

"Q Now you further testified that you had had occasion to set and release that lever many times in the past?

"A Every time I took the machine out of operation.

"Q In fact you had set the lever in that position just a few minutes before the injury had occurred, had you not?

"A That's right.

"Q The lever, in this set or depressed position, is pulling against the tension of a spring to which it is attached, is it not?

"A It is.

"Q And you knew that at that time?

"A Yes.

"Q And you knew by reason of that tension, that upon its being released it releases with considerable force?

"A Yes.

"Q Now at this particular moment, as I recall your testimony, you were just getting ready to release the lever to commence baling this second section?

"A I had pulled in and stopped, and was getting ready to start on this next field of hay.

"Q And I believe you testified that you were just in the act of reaching for the lever?

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"A For some reason I turned around on the seat of the tractor.

"Q I realize that, but didn't you say you were just getting ready to release the lever?

"A I was in the process of beginning to bale.

"Q Let's see if we can be a little more definite than that. Didn't you say that you were just reaching for the lever at the time it released unexpectedly upon you?

"A I may have said that.

"Q This was in the afternoon?

"A Yes. I think it was right after lunch.

"Q You could see well at that time, could you not?

"A Yes.

"Q Was there anything that distracted your attention at that particular moment from what you were doing?

"A Nothing that I know of, other than getting ready to start on the field.

"Q Now the lever, in the position that it was in, could be released without your bringing your face over it, could it not?

"A Yes, it could be released.

"Q But nevertheless, as I understand it, you did bring your face over the lever?

"A Well, I was in a position for it to strike me. That's true.

"Q And in that position you had brought your face over the lever?

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"A That's right.

"Q And the lever, upon being released, came up and hit you in the face?

"A That's right.

Plaintiff, however, argues that contributory negligence is applicable only where the party has exposed himself to the particular risk from which he suffers harm, and that in the instant case the particular risk was not the lever held under spring tension, but the allegedly defective catch which held it in place. We submit such is not the case. An analagous situation existed in the case of *Raymond v. Union Pacific R. Co.*, 113 *Utah* 26, 191 P. (2) 137. In that case plaintiff, who had had many years' experience in railroading, was on the end of an open gondola car during switching operations, his hand grasping the top of the car and his fingers on the inside. The car was loaded with scrap metal, a portion of which shifted and crushed his hand. He acknowledged that it was unnecessary for him to have his hand inside the car, as there was an available grab bar he could have been holding onto. The lower court held him guilty of contributory negligence as a matter of law, and this court affirmed. On this particular point the court observed:

> "Notwithstanding his extensive railroad experience, and his cognizance of the dangers of shifting loads he placed his hand in a position on and inside the car in such a manner that a slight forward shifting of the load could and did injure it.
>
> "On cross-examination plaintiff testified as follows:

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"'Q. You knew it was extremely dangerous to put your hand in such a position on the top of that gondola; you knew that it was dangerous to, and unsafe thing to do, didn't you, Mr. Raymond, to place your hand on the end of that gondola so that * * * A. Yes.

"'Q. If some of the load shifted you might get injured; you knew that? A. I wasn't expecting the load to shift.

"'Q. Of course not. You wouldn't deliberately put your hand there? A. No.

"'Q. *But you knew it was dangerous to put any part of your body inside of a loaded gondola when it is in movement, didn't you?* A. It is.

"On redirect examination plaintiff was led by his counsel into stating that what he meant by his testimony on cross-examination was that it was unsafe under the circumstances to put his hand inside the car, but that if the load had been tied down securely, it would not have been unsafe. The explanation offered by plaintiff on redirect examination can hardly be regarded as a satisfactory explanation of his cross-examination.

" * * * *.

"The obvious truth, from plaintiff's own testimony, is that he gave no thought to his own safety. He placed his hand in a position which he knew to be dangerous, when there was a safe method open to him. The court below correctly held that plaintiff was guilty of contributory negligence as a matter of law."

The same is true here. Plaintiff had no thought of his own saftey. He placed his face in a position he knew to be dangerous, when there was a safe method

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open to him. We submit that under the circumstances the plaintiff herein, like the plaintiff in the case just cited, was himself, by his own testimony, negligent as a matter of law.

C.

THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT PLAINTIFF ASSUMED THE RISK OF HIS INJURIES.

Here again we assume for the purpose of the argument that defendant was negligent, but urge that even upon that assumption the plaintiff cannot recover for the reason that he assumed the risk of his injuries. Two comparatively recent cases involving the doctrine of assumed risk as it is applied in this jurisdiction are *Clay v. Dunford* (*Utah*) 1952, 239 *P.* (2) 1075, and *Wold v. Ogden City* (*Utah,* 1953), 258 *P.* (2) 453.

The Clay case involved a situation where the plaintiff stepped from his parked station wagon into the path of a moving vehicle. The doctrine was held not there applicable because at the time plaintiff was struck he was

> "standing on the shoulder of the highway where vehicles ordinarily do not travel, with his back turned toward the oncoming truck, completely negativing knowledge or appreciation of the specific danger, and negativing any intention voluntarily to expose himself to a known danger, * * * ".

In a concurring opinion, Mr. Justice Wolfe pointed out that for the doctrine to be applicable it must be

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shown that there is: (1) a palpably dangerous condition; (2) knowledge and appreciation of the danger; and (3) a voluntary act by plaintiff showing that he was willing to take the chance.

We submit that each condition was present in the instant case. The depressed lever held under spring tension constituted a palpably dangerous condition; plaintiff acknowledged that he was aware of the danger —but din't think the catch would let go; he voluntarily and deliberately exposed himself to the danger, admitting that it was unnecessary for him to do so. The fact he didnt think the catch would let go does not obviate his awareness of the danger. The situation is analogous to the workman who put his hand in the open gondola car (*Raymond v. Union Pacific, supra*) "not expecting the load to shift". Or like an individual who knowingly and deliberately looks into the muzzle of a gun he knows to be loaded and on cock. Certainly he doesn't expect that the catch which holds the gun on cock is defective, or that it will slip and permit the gun to discharge, but when he knowingly and needlessly brings any part of his body into range under those circumstances he assumes the risk of any consequences, as well as being contributorily negligent.

True it is that a piece of farm machinery such as this is not an instrument inherently dangerous in and of itself, but there are moving parts thereof, gears and pulleys as well as spring tension levers, which present a hazard. Likewise, the engine on the baler being in operation, a vibration is created which will have a tendency to dislodge the catch on a spring tension lever where the same is not firmly set, or where the locking

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parts have become worn through usage. These are facts which are well known to any reasonably prudent man, more especially to one who has worked about farm machinery generally to the extent plaintiff had. Thus, we submit that the plaintiff, being fully aware of the potential danger, but nevertheless deliberately and needlessly exposing himself thereto, brought himself within the doctrine of assumed risk.

We have also mentioned the case of *Wold v. Ogden City, supra.* This case involved an open trench extending along the Northerly side of 18th Street, between Washington and Grant Avenues, in Ogden City. Plaintiff resided on the North side of 18th Street, about midway of the block. Plaintiff was aware of the open trench. About 2:30 A. M., he was returning home with his wife "looked the situation over", "decided he could safely cross", straddled the ditch to assist his wife across, and fell into the trench when one of the banks gave way under his foot. There were no crossings over the trench, and persons living on the North side of 18th Street either had to jump the trench, or go to Grant Avenue or Washington Avenue and cross in the street. This Court held:

> "Under such facts we believe plaintiff was contributorily negligent and also assumed a known risk precluding recovery as a matter of law, denying no constitutional right to a jury trial."

Those facts are analogous to those in the instant case. In each case the plaintiff was aware of the hazard —the open ditch in the Wold case, and the lever under spring tension in this case. In each case a safe way

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of proceeding was provided—by going around the trench in the Wold case, and by operating the lever without exposing his head to its line of travel in this case. In neither case did the plaintiff forsee the specific occurrence which resulted in his injuries—the bank giving way in the Wold case, or the catch giving way in this case. This Court held he was contributorily negligent and assumed the risk in the Wold case. We respectfully submit that the same conclusion must of necessity follow here. As pointed out in the Wold case:

> "the doctrine of assumption of risk, originally applicable to employer-employee relations, has been extended to some situations where one knows of a condition and concludes to accept its attendant hazards and acts accordingly without force of necessity."

CONCLUSION.

Defendant submits that the lower court had a duty as a matter of law, under the evidence as it stood at the conclusion of plaintiffs case, to direct a verdict in favor of the defendant, upon each of the grounds assigned, namely, (1) no negligence shown on the part of the defendant; (2) contributory negligence on the part of plaintiff; and (3) assumption of risk on the part of plaintiff.

In regard to defendant's negligence, which plaintiff contends consisted of (1) omitting the bushing, and (2) using an undersized bolt, the evidence consisted of:

A. AS TO THE BUSHNG.

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1. Egan's positive testimony that it was not omitted, which testimony was not contradicted, directly, indirectly or inferentially,

2. The lever operated satisfactorily during the several weeks of operation prior to the accident,

3. Without the bushing and with the bolt cinched tight (as it admittedly was) the lever wouldn't operate at all,

4. Plaintiff's concession that it might have become broken and fallen out,

5. Plaintiff's admission that he couldn't see well at the time he detached the lever, and,

6. Plaintiff's admission that he lost in the grass all of the attaching parts that were present except the head end of the bolt.

Thus, under the evidence on this point there was not even a scintilla of evidence that the bushing had been omitted by Egan—nothing whatever that could support a finding by the jury that it had been omitted.

B. AS TO THE BOLT.

1. There was no evidence whatever that the bolt was undersized, except in the sense that it was of slightly less diameter than the bushing through which it passed, which is normal.

2. It was the bolt that was supplied by the manufacturer for this particular purpose.

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3. There was no evidence whatever that the size of the bolt proximately caused the catch to give way, and it would be pure speculation to say that such was the cause.

We submit that the status of the evidence as above referred to upon the question of the defendant's negligence supports as a matter of law the ruling of the lower court granting a directed verdict, without regard to the questions of contributory negligence or assumption of risk. Notwithstanding that, however, plaintiff's own evidence established as a matter of law that he was guilty of contributory negligence in needlessly exposing himself to the hazards of the known danger, and that in so doing he assumed the risk of the resulting consequences.

Respectfully submitted,

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